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No. 05-1449

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SUPREME COURT, U.S.

In The
Supreme Court of the United States

TIMOTHY B. HUFFMAN,

Petitioner,

v.

THE PEOPLE OF THE STATE OF MICHIGAN,

Respondent.

On Petition For Writ Of Certiorari
To The Court Of Appeals Of Michigan

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

WILLIAM A. FORSYTH (P 23770)
Kent County Prosecuting Attorney

TIMOTHY K. MCMORROW (P 25386)
Chief Appellate Attorney
Counsel of Record

Business Address:
82 Ionia NW
Suite 450
Grand Rapids, MI 49503
(616) 632-6710

Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. May a statute prohibiting indecent exposure be applied to Petitioner, who created a film that consisted of his exposed genitals and then showed the film on Cable Access TV, a forum designed for public viewing?

2. Did Petitioner have fair notice that it is illegal to expose one's genitals in an open and indecent manner?

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STATEMENT OF THE CASE

Petitioner was convicted of a violation of Michigan's indecent exposure statute, Michigan Complied Laws [MCL] 750.335a. The charges concern Petitioner's display, on a public access television program, of a skit. The taped skit consisted of a scene of a man's genitals, with a face drawn on the penis. Dialogue is from a purported comedian named "Dick Smart," and consists of double entendre jokes.

Trial was held in the 61st District Court for the City of Grand Rapids. Maria Allen testified that she was home on April 7, 2000, looking through various television stations, when she came upon Channel 26, the Public Access television station. She saw the skit in question. She saw a "blue-white type of handkerchief that sometimes people wear in their hair, and in front of it was genitals and a penis, and on the penis, there was a face drawn on it like a – to make it look like a face" (Trial, pp 23-24). "It looked like it was like a puppet show but with a man's private parts," and "the whole screen was pretty much the handkerchief and the private parts on T.V." (Trial, p 24). She called the cable station on Monday morning to complain about what she had seen (Trial, p 25).

The station on which the program is aired, GRTV, is "a place where citizens have a chance to put on their own T.V. programs" (Trial, p 29). "It's sort of a First Amendment forum, so in other words, no matter what your point of view, you can bring a tape to GRTV" (Trial, p 40). The tapes are not viewed before airing (Trial, p 53). There are about 46,000 cable subscribers in Grand Rapids, all of whom would have access to Channel 26, and some people

outside the city would also have access to the channel (Trial, pp 55-57).

Petitioner had told a friend that he had developed a character named "Dick Smart" (Trial, p 62), and that he had drawn a face on his penis, draped himself, and that he had the character make comments with double meanings (Trial, p 65).

Petitioner had called the grandfather of his children on the day the "Dick Smart" routine was shown, and told him "not to let the boys watch it, because it's more for the adults, and he just – just don't let 'em watch it" (Trial, p 76).

Petitioner voluntarily surrendered himself for arrest. A copy of the videotape of the program was found in his home (Trial, p 85). As he was being processed for the arrest, Petitioner said "that he was hoping that this would get him on the Howard Stern show" (Trial, p 85).

Petitioner appealed his conviction to the Kent County Circuit Court, which affirmed in an opinion and order dated November 3, 2003. The Court of Appeals granted Petitioner's leave to appeal. The Court of Appeals then affirmed the defendant's convictions in a published opinion dated May 10, 2005. The Michigan Supreme Court denied further review in an order dated January 12, 2006.

REASONS FOR DENYING THE WRIT

-I-

PETITIONER CREATED A FILM THAT CONSISTED ENTIRELY OF HIS GENITALS AND A VOICE-OVER SOUND TRACK. HE PLACED THAT FILM ON CABLE ACCESS TELEVISION. HIS ACTION WAS AN INDECENT EXPOSURE IN AN OPEN AND PUBLIC MANNER, AND HIS PROSECUTION WAS CONSTITUTIONAL.

The facts of this case are undisputed. Petitioner created a film of his genitals, and distributed that film through Public Access television where it was available to be seen by an unsuspecting public. There is no doubt that Petitioner's conduct would be the proper subject of an indecent exposure prosecution under Michigan law had he chosen to conduct his skit in a public square. Should the result be different because Petitioner used Public Access Television to present his skit over a wider area? We submit that the answer is no.

The Michigan indecent exposure statute, MCL 750.335a, states:

> Any person who shall knowingly make any open or indecent exposure of his or her person or of the person of another shall be guilty of a misdemeanor, punishable by imprisonment in the county jail for not more than 1 year, or by a fine of not more than $500.00, or if such person was at the time of the said offense a sexually delinquent person, may be punishable by imprisonment in the state prison for an indeterminate term, the minimum of which shall be 1 day and the maximum of which shall be life: Provided, that any other provision of any other statute

> notwithstanding, said offense shall be triable only in a court of record.

Petitioner was not charged as a sexually delinquent person. The charge was that he made an "open or indecent exposure of his or her person or of the person of another." From evidence presented at trial, it is clear that the film was of the Petitioner himself. The issue is whether Petitioner's act, filming his exposed genitals, with the camera solely on his genitals for the entire film, and then displaying this film on public access television, was properly the subject of Michigan's indecent exposure statute.

The indecent exposure statute prohibits "any open or indecent exposure."[1] It does not prohibit only live exposures. The statute has been generally applied to exposures in the public, but that is mainly because most people who expose themselves do so in a live exposure, not in the imaginative manner in which Petitioner chose.[2]

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[1] The statute does not, however, require that anyone actually observe the exposure. *People v Vronko*, 228 Mich App 649, 655; 579 NW2d 138 (1998).

[2] Petitioner refers to his prosecution as "completely unprecedented" (Petition for Writ of Certiorari, p 9). It is certainly not unprecedented, nor the least bit controversial, to hold that a man may not expose his genitals in an open manner. If there are no prosecutions of other people who have prepared similar programs and then aired those programs over Public Access Television, it is likely because no other person has come up with this way of violating the indecent exposure statute. Petitioner's "Dick Smart" routine was more than simple nudity; it was a film that showed a man's genitals and (except for a handkerchief and markings on the penis), nothing else. Petitioner's suggestion that the "unprecedented" nature of the prosecution precludes criminal liability for his actions is somewhat akin to arguing that a person who carved a zucchini to resemble a gun could not be convicted of robbery simply because no other reported case ever showed a defendant who accomplished a robbery the same way.

Petitioner compares his exposure of himself to nudity contained in films, magazines, books, or television (i.e., network or cable) programming. Petitioner has throughout this litigation compared his exposure to a network broadcast of "Schindler's List," a movie containing scenes of frontally nude actors depicting Jewish concentration camp prisoners. Petitioner contends that because his exposure, like that of the actors in "Schindler's List," is mixed (purportedly) with constitutionally protected communication, this prosecution prohibits speech. He accordingly raises the specter that, if his conviction is allowed to stand, producers of all sorts of cable television programs will be prosecuted for presenting nudity on programs.

Most cases addressing nudity, or sexually explicit scenes, in a movie, have done so in the context of an allegation that the movie was obscene. This Court has indicated that "[s]cenes of nudity in a movie, like pictures of nude persons in a book, must be considered as part of the whole work." *Erznoznik v Jacksonville*, 422 US 205, 211, n7; 95 S Ct 2268; 45 L Ed 2d 125 (1975), citing *Miller v California*, 413 US 15, 24; 94 S Ct 2750; 37 L Ed 2d 419 (1973). "In this respect such nudity is distinguishable from the kind of public nudity traditionally subject to indecent-exposure laws." *Erznoznik*, 422 US at 211, n 7. The issue in *Erznoznik* involved a city ordinance that prohibited the showing of films containing nudity at a drive-in theater when the theater's screen was visible from a public street or place. This Court held that this ordinance was unconstitutional. But as the Court noted, the problem with the ordinance was that it addressed only those movies containing nudity and singled them out in a manner that prevented those who would like to see the movies from seeing them at a drive-in theater. It is true that the Court said

"the offended viewer readily can avert his eyes" from the screen where nudity was being shown, *Id.*, 422 US at 212, but this comment was made in the context of "a motion picture [that] must be considered as a whole, and not as isolated fragments or scenes of nudity." *Id.* And, of course, drive-in theaters were never viewed as public fora where a person could simply express views.

"Schindler's List" has a total running time of 197 minutes. Petitioner attached to his brief in the Kent County Circuit Court an affidavit that indicated "Schindler's List" has two scenes containing nude actors, which are two to three minutes in combined length. "Dick Smart," in contrast, is a film clip that contains only one scene: a man's exposed penis and scrotum. The rest of the man is not shown. It can hardly be said that the "nudity" in question was an "isolated fragment." And unlike "Schindler's List," or the movie in question in *Erznoznik*, "Dick Smart" was presented on Public Access Television where one presumably would not expect to be confronted with the sort of image presented.

It cannot be overstated that this case had nothing to do with Petitioner exercising his free speech rights. Michigan has recognized that its indecent exposure statute regulates conduct, an "open or indecent exposure." The statute was not designed to prohibit speech. See *People v Wilson,* 95 Mich App 440, 445; 291 NW2d 73 (1980). It applies regardless of whether a message is being conveyed, and "[i]t reflects no bias, censorship or preference for a particular viewpoint over another." *Gannett Co v Troy*, 156 Mich App 126, 136; 401 NW2d 33 (1986). In this sense, the statute is content-neutral. See *Plymouth Twp v Hancock*, 236 Mich App 197, 203, n3; 600 NW2d 380 (1999) (declaring ordinance content-neutral if it does not attempt to

regulate speech on the basis of message). The expression or viewpoint of the indecently exposed individual is of no significance.

Petitioner maintains that the statute does not reach conduct that occurs on television. But it must be remembered that the exposure in this case occurred on Public Access Television. Public access channels, unlike restricted, premium channels (for example, the Playboy Channel), are accessible by all cable viewers. Such channels are required for general public use, see 47 USC § 532. The purpose of such channels is "to promote competition in the delivery of diverse sources of video programming and to assure that the widest possible diversity of information sources are made available to the public from cable systems in a manner consistent with growth and development of cable systems." 47 USC § 532(a). Those channels permit individuals to produce programs that they can submit to the public, a sort of electronic Hyde Park. A cable operator is not allowed to exercise editorial control over the views expressed in such programs, but Congress has recognized that a cable operator may refuse to show a program that lacks constitutional protection:

> A cable operator shall not exercise any editorial control over any video programming provided pursuant to this section, or in any other way consider the content of such programming, except that a cable operator may refuse to transmit any leased access program or portion of a leased access program which contains obscenity, indecency, or nudity and may consider such content to the minimum extent necessary to establish a reasonable price for the commercial use of designated channel capacity by an unaffiliated person.

47 USC § 532(c)(2). A casual television viewer does not reasonably expect to encounter an indecently exposed person on Public Access Television. In this sense, the viewer is no different than someone who encounters an indecently exposed person on the street. Cf. *Denver Area Educ Telecomms Consortium, Inc v FCC*, 518 US 727; 116 S Ct 2374; 135 L Ed 2d 888 (1996) (plurality opinion) (Kennedy, concurring in judgment in part, characterizing public access channels as public fora, and noting "[p]ublic fora do not have to be physical gathering places"). Here, Petitioner exposed his penis in a setting where others were likely to observe the exposure, so the statute constitutionally applies.

The issue is not precisely whether public access television constitutes a "public forum." Cases addressing that issue typically have done so in the context of whether any restrictions can be placed on the content of programs. For example, in *Alliance for Community Media v FCC*, 56 F3d 105, 123 (DC Cir, 1995), the Court said that Public Access cable stations were not "so dedicated to the public that the First Amendment confers a right on the user to be free from any control by the owner of the cable system." In other words, GRTV could constitutionally prohibit the airing of a film such as "Dick Smart" consistent with the First Amendment – the same way that the government could prohibit the exhibition of one's genitals on a public street corner, even where a person would be protected by the First Amendment to engage in political activities.

Public Access Television is a different creature than ordinary cable television. Its central purpose is to permit the public to air programs. The public should be held to the same standard for this sort of program as for any

conduct that occurs live in public. You can say whatever you want; but you can't expose yourself.

This Court has noted that, of all forms of communication, broadcasting has "the most limited First Amendment protection." *FCC v Pacifica Foundation*, 438 US 726, 748; 98 S Ct 3026; 57 L Ed 2d 1073 (1978). The Court observed that "the broadcast media have established a uniquely pervasive presence in the lives of all Americans," and that "[p]atently offensive, indecent material . . . confronts the citizen, not only in public, but also in the privacy of the home," usually without sufficient prior warning to allow the recipient to avoid it. *Id.*[3] It would be one thing for a state statute to prohibit the airing of a particular point of view; it is quite another thing for a state statute to prohibit indecent exposure, and to apply the state's indecent exposure statute to a presentation like Petitioner's "Dick Smart" routine on Cable Access Television.

Denver Area, supra, held that a provision of the Cable Television Consumer Protection Act permitting cable television operators to prohibit programming which contained "patently offensive" sex-related material on leased access channels was constitutional, but that a provision which required cable operators who decide to carry such programming to segregate the programs on a single channel and to block access unless written consent

[3] Petitioner suggests that the Michigan Court of Appeals misapplied *FCC v Pacifica Foundation* in upholding a criminal conviction. But the Michigan Court of Appeals only cited *FCC v Pacifica Foundation* for the proposition that there are limits to First Amendment protection for broadcast media, and that the First Amendment does not bar prosecution for conduct that can properly be reached by the criminal law.

was obtained from subscribers, and which permitted cable operators to prohibit such programming on public, educations, or governmental use challenges, violated the First Amendment. The Court found that the need to protect children from exposure to "patently offensive sex-related materials," *id.*, 518 US at 743, justified the provision that permitted prohibition of certain programming. The instant case involves a crime committed by a man who used a Public Access Television channel as the means of perpetrating this crime, so *Denver Area* is not directly on point with the issue in the instant case; but it does support that a blanket prohibition against certain conduct – for example, exposing oneself in an open and indecent manner – is constitutionally permissible.

Petitioner claims that Fundamental First Amendment values are at stake. But one cannot expose oneself to an unsuspecting public in hopes of eliciting laughter and then use the First Amendment as a shield from criminal prosecution. Under Petitioner's logic, he can evade prosecution by combining the proscribable conduct (open or indecent exposure) with protected expression (or speech), whether he appears on public access television or stands in the middle of the Calder Plaza in downtown Grand Rapids, Michigan.

While a routine comedy skit intended to entertain others might, in a particular context, enjoy First Amendment protection, Petitioner used his penis (nudity or nonspeech) and words (narration or speech) to express a "comedic" message. In effect, this is expressive communication that is subject to less stringent (intermediate) First Amendment scrutiny:

> [W]hen "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. . . . [A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

United States v O'Brien, 391 US 367, 377; 88 S Ct 1673; 20 L Ed 2d 672 (1968).

Michigan's indecent exposure statute is not designed to preclude pure speech or expression. The statute as applied to Petitioner does not preclude the expression of any ideas. It simply precludes a particular form of conduct: exposing his genitals (or the genitals of another). Such a prohibition is within the constitutional power of the government. Public indecency statutes, similar to the one in issue, promote important governmental interests. See *Barnes v Glen Theatre, Inc*, 501 US 560; 111 S Ct 2456; 115 L Ed 2d 504 (1991) (plurality opinion) (Rehnquist, C.J., joined by two justices, noting governmental interest in protecting public order and morality); (Souter, J., concurring in judgment, noting governmental interest in curtailing undesirable "secondary effects" of adult entertainment (nude dancing)). The statutory prohibition here is precisely tailored to effectuate an important governmental interest in maintaining public order, for instance.

In *Clark v Community for Creative Non-Violence*, 468 US 288; 104 S Ct 3065; 82 L Ed 2d 221 (1984), this Court upheld a National Park Service regulation that prohibited people from sleeping in certain parks. A group wanted to sleep in Lafayette Park and the Mall in Washington, D.C. The group said that its purpose was to convey a message about homelessness, and that the regulation interfered with their First Amendment rights. The Court found that the regulation was constitutional, that the Park Service had the right to establish reasonable time and place regulations, even assuming that sleeping were considered expressive conduct. The right to prevent exposure of one's genitals is at least as strong a governmental interest as prohibiting people from sleeping in parks that are not designed as campsites.

Much of the Petitioner's argument concerns the power of the government to restrict certain types of programming. But, it must be reiterated, the program in question here differs from that discussed in other cases in two particulars: first, it was not merely nudity, but a film that consisted entirely of a close-up shot of a man's genitals; and second, it occurred on Public Access Television, not a premium cable service where viewers presumably are aware of the programming available.

Petitioner relies on *United States v Playboy Entertainment Group, Inc*, 529 US 803; 120 S Ct 1878; 146 L Ed 2d 865 (2000). *Playboy* involved a First Amendment challenge to a government regulation of adult programming on cable television. The regulation (civil) restricted the airing of "sexually explicit adult programming or other programming that is indecent" on cable television; the adult programming had to be fully scrambled or shown during hours when children were less likely to see images

filtering through cable transmission. Playboy challenged the regulation, arguing that it impermissibly restricted adult programming. While this Court recognized a compelling governmental interest in protecting children from indecent materials, it concluded that the least restrictive means were not used to further the interest and struck down the law as a content-based restriction of speech. Here, however, Respondent is not defending a regulation that permits programming but restricts its time and place; we instead are dealing with a far simpler issue, a statute that contains the (one would hope) noncontroversial provision that you cannot expose yourself in an open manner, and that presenting a film that consists of nothing but penis and scrotum on Public Access Television is indecent exposure by any definition.

Denver Area Educ Telecomms Consortium, Inc v FCC, supra, is likewise uncontrolling. *Denver Area*, like *Playboy Entertainment*, involved a civil regulation of cable programming – a content-based restriction.[4] Michigan's indecent exposure statute does not attempt to regulate cable programming insofar as speech is concerned, particularly on Public Access Television. By enforcing the statute, Respondent was protecting the public in general, here unsuspecting public access television viewers,[5] from

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[4] In *Denver Area*, this Court, in pertinent part, invalidated a section of the Cable Television Consumer Protection and Competition Act of 1992 that allowed cable system operators, at their option, to ban indecent programming on public access channels. The government, like in *Playboy Entertainment*, asserted a compelling interest in protecting children, but the Court ruled, in part, that the regulation was not appropriately tailored to that end.

[5] Petitioner argued in the Michigan Courts that subscribers can block programming on public access channels, but there is no record evidence that subscribers were advised of this right.

encountering indecently exposed individuals such as Petitioner. Respondent did not seek to restrict Petitioner's access to Public Access Television, and we do not seek to restrict any point of view he may wish to express.

Petitioner has consistently taken the position that this prosecution was an improper attempt to evaluate the artistic merit of his program. As noted previously, the issue is Petitioner's conduct, not his expression. Petitioner was not prosecuted for bad comedy. He was prosecuted for exposing himself on Public Access Television, in a place where he knew he would be seen, and in a manner that he knew would be offensive.

The First Amendment requires that we tolerate much that is offensive. Subjective views of indecency are an insufficient basis to preclude the exercise of free speech. Even vulgar comments are protected, see *Cohen v California*, 403 US 15; 91 S Ct 1780; 29 L Ed 2d 284 (1971) (a jacket that contained words suggesting sexual intercourse with the selective service system held constitutionally protected speech). Some view this as a healthy and robust sign of a free society; others view it as a coarsening of society. Both views are to some extent correct.

But can the First Amendment be used as a shield to protect any and all conduct? Are there no actions, no matter how minimal, that the government can take against indecent conduct? If a state can constitutionally prohibit the indecent exposure of a person – which we think the state clearly can do – and if Petitioner's conduct is viewed as open conduct under Michigan's indecent exposure statute, his conviction was constitutional. What restrictions can be placed in other contexts on nudity or sexually explicit programming is an interesting intellectual question,

but it isn't apropos to the instant case at all. This matter is far simpler than that. Petitioner filmed his exposed genitals, and put that film on public access television. The First Amendment permits that conduct no more than it permits Petitioner to expose himself in on the steps of the United States Supreme Court. Respondent submits that the Michigan courts properly ruled that the defendant's conduct was subject to Michigan's indecent exposure statute, and that this Court should decline to grant the writ of certiorari.

-II-

MICHIGAN'S INDECENT EXPOSURE STATUTE GIVES FAIR NOTICE THAT IT IS IMPROPER TO EXPOSE ONESELF IN AN OPEN AND INDECENT MANNER, NO MATTER THE FORUM IN WHICH A PERSON CHOOSES TO ENGAGE IN THE FORBIDDEN CONDUCT.

Petitioner alternatively argues that Michigan's indecent exposure law is unconstitutionally vague as applied to his conduct, because it did not give fair notice to Petitioner that he could not expose himself on a Public Access television channel.

Petitioner is not alleging that the indecent exposure statute itself is vague. He does not suggest, for example, that he lacked notice that one cannot expose genitals on a city street. The defendant's main argument is that, since no one before him ever thought of violating the indecent exposure statute in the manner he did, perforce he cannot be prosecuted for his conduct.

This Court has had many occasions to address the "fair notice" issue. In *Grayned v City of Rockford*, 408 US

104, 108-189; 92 S Ct 2294, 2298-2299; 33 L Ed 2d 222 (1972), the Court observed:

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attended dangers of arbitrary and discriminatory application. Third, but related, where a vague statute 'abut(s) upon sensitive areas of basic First Amendment freedoms," it 'operates to inhibit the exercise of those freedoms.' Uncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked. (internal cites omitted)

The Court in *Grayned v City of Rockford* rejected a claim that an anti-noise ordinance, forbidding "the making of any noise or diversion which disturbs or tends to disturb the peace or good order" of a school or class, was unconstitutionally vague. The Court recognized that finding the appropriate meaning of the words of the ordinance was difficult, but also observed that "[c]ondemned to the use of

words, we can never expect mathematical certainty from our language." *Id.*, p 110, 92 S Ct at 2300.[6]

Petitioner certainly knew that he could not expose himself. He knew, or at least is reasonably charged with knowing, that he had no right to present an indecent exposure of himself or anyone else on Public Access Television. He certainly knew that his conduct was inappropriate (going so far as warning the grandfather of his children not to allow the children to watch the program). While legislative bodies are charged with making laws sufficiently clear to advise the public what is illegal, they cannot be charged with the impossible burden of anticipating every new and imaginative way that a statute can be violated.

Petitioner cites *Rabe v Washington*, 405 US 313; 92 S Ct 993; 31 L Ed 2d 258 (1972), where this Court struck down a conviction for exhibiting obscene motion pictures. But the problem in that case was that the statute did not give notice that material would be obscene in one context and not in another. Petitioner in this case was not charged with obscenity. He was charged with a crime based on his conduct, not his expression. Application of Michigan's indecent exposure statute obviously depends on location; it is perfectly permissible to be naked while showering in the privacy of one's own home, but not while strolling down the street. But the indecent exposure statute is limited to open or indecent exposures. The defendant deliberately exposed himself in a manner that he knew would be seen

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[6] "Words strain, / Crack and sometimes break, under the burden, / Under the tension, slip, slide, perish, / Decay with imprecision, will not stay in place, / Will not stay still." T.S. Eliot, Four Quartets, "Burnt Norton," Section V.

by a wide variety of people with no warning of what would be seen. The indecent exposure statute gave him fair warning that his conduct could subject him to criminal liability. His argument to the contrary presents no basis on which this Court should grant review.

CONCLUSION

Respondent prays that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

WILLIAM A. FORSYTH (P 23770)
Kent County Prosecuting Attorney
TIMOTHY K. MCMORROW (P 25386)
Chief Appellate Attorney
Attorney of Record